People Realty Sdn Bhd v Red Rock Construction Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–336 OF 2004
DENIS ONG, HASHIM YUSOFF AND NIK HASHIM JJCA
26 OCTOBER 2007

Companies and Corporations — Winding up — Inability to pay debts — Insolvency — Restraining advertisement of petition — Whether there is in existence a cross claim — Whether cross claim ought to be considered at interlocutory stage or at hearing of petition proper

Companies and Corporations — Winding up — Inability to pay debts — Insolvency — Restraining advertisement of petition — Whether court precluded from granting injunction once petition filed

A winding up petition was presented by the respondent against the appellant for failure to comply with a statutory notice under s 218 of the Companies Act 1965 requiring payment of judgment sum of RM1,117,179.68. The judgment was obtained on 11 June 2003. It was an arbitral award converted pursuant to s 27 of the Arbitration Act 1950. After service of the statutory notice but before the filing of the winding up petition, the appellant had filed a cross claim claiming special damages and general damages. The appellant had applied to set aside the arbitral award but failed. Its appeal to the Court of Appeal was dismissed on 22 June 2004. Before the filing of the cross claim, the High Court and the Court of Appeal had both dismissed the appellant's applications for stay of execution of the judgment pending appeal. The cross claim has not been disposed of. In respect of the winding up petition, the appellant filed a notice of motion seeking an order that the respondent be restrained from taking any further proceeding upon the petition by advertising the same and that the petition be removed from the file of proceedings. The High Court dismissed the motion with costs. The appellant appealed to the Court of Appeal.

Held, dismissing the appeal with costs:

(1) The respondent's winding-up petition was grounded on a valid judgment the execution of which had not been stayed. In fact both the High Court and the Court of Appeal had before the filing of the cross

claim dismissed the appellant's application for a stay of execution of the judgment. Hence the respondent should not be prevented from pursuing its right to have the appellant wound up for its inability to pay its debt. Only on the hearing of the petition the court would be able to consider the cross claim and determine whether it should exercise its discretion to order winding up or not to order it. In the event the appellant is ordered to be wound up the cross claim can still be proceeded by the liquidator on behalf of the appellant under s 236(2) of the Act. Thus, to consider the cross claim, which is a separate issue altogether, before the hearing of the petition is premature and therefore, it should not be considered at that stage (see para 8).

(2) The court agreed with the respondent that the cross claim at this stage of the proceedings remains illusory and uncertain since it had still to go through the process of litigation before it could eventually graduate into a judgment. Even if there exists the cross claim, the petition should not be struck out in limine and should be heard on its merit. Once a winding up petition is filed, the court was precluded from granting an injunction against advertisement or gazettal of the petition (see paras 10 & 12).

[Bahasa Malaysia summary

Satu petisyen penggulungan telah di kemukakan oleh responden terhadap perayu bagi kegagalan untuk mematuhi notis statutory di bawah s 218 Akta Syarikat 1965 yang memerlukan pembayaran jumlah penghakiman sebanyak RM1,117,179.68. Penghakiman telah diperolehi pada 11 Jun 2003. Ianya adalah award timbang tara yang ditukar menurut s 27 Akta Timbang Tara 1950. Selepas penyampaian notis statutori tetapi sebelum pemfailan petisyen penggulungan, perayu telah memfailkan tuntutan bersilang menuntut gantirugi khas dan am. Perayu telah memohon untuk mengenepikan award timbang tara tetapi gagal. Rayuannya kepada Mahkamah Rayuan telah ditolak pada 22 Jun 2004. Sebelum memfailkan tuntutan bersilang, Mahkamah Tinggi dan Mahkamah Rayuan kedua-duanya telah menolak permohonan perayu untuk menangguhkan perlaksanaan penghakiman sementara menunggu rayuan. Tuntutan bersilang tidak di selesaikan lagi. Berkenaan dengan petisyen penggulungan, perayu telah memfailkan usul memohon perintah bahawa responden dihalang daripada mengambil prosiding selanjutnya apabila petisyen dengan m,engiklankan perkara yang sama dan petisyen tersebut dikeluarkan daripada fail prosiding. Mahkamah Tinggi menolak usul dengan kos. Perayu merayu kepada Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Petisyen penggulungan responden berdasarkan kepada penghakiman

yang sah, perlaksanaan yang mana tidak ditangguhkan. Sesungguhnya, kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan telah sebelum pemfailan tuntutan bersilang menolak permohonan perayu untuk penangguhan perlaksanaan. Oleh itu, responden seharusnya tidak dihalang daripada meneruskan haknya untuk menggulungkan perayu bagi ketidak upayaannya untuk membayar hutangnya. Hanya pada pendengaran petisyen mahkamah boleh mempertimbangkan tuntutan bersilang dan menentukan sama ada ianya seharusnya melaksanakan budi bicaranya untuk menggulungkan atau tidak memerintahkannya. Dalam keadaan perayu diperintahkan untuk digulungkan tuntutan bersilang masih boleh diteruskan oleh penyelesai bagi pihak perayu di bawah s 236(2) Akta. Oleh itu, untuk mempertimbangkan tuntutan bersilang, yang mana adalah isu yang berlainan, sebelum pendengaran petisyen adalah pra matang dan oleh itu ianya tidak seharusnya dipertimbangkan pada peringkat ini (lihat perenggan 8).

(2) Mahkamah bersetuju dengan responden bahawa tuntutan bersilang pada peringkat prosiding ini kekal khayalan dan tidak pasti sejak ianya masih perlu melalui proses litigasi sebelum ianya boleh akhirnya lulus sebagai satu penghakiman. Walaupun terdapatnya kewujudan tuntutan bersilang, petisyen tidak seharusnya ditolak secara limine dan seharusnya didengar atas meritnya. Apabila petisyen penggulungan di failkan, mahkamah adalah dihalang daripada memberikan injunksi terhadap pengiklanan atau penggezetan petisyen (lihat perenggan 10 & 12).]

Notes

For cases on inability to pay debts, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1081–1142.

Cases referred to

Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn End [2002] 4 MLJ 390 (refd)

Bayoil SA, Re [1999] 1 WLR 147 (refd)

Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 (refd)

Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Ltd [1997] 2 MLJ 756 (refd)

Morgan Guaranty Trust Co New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 (refd)

RHB Bank Bhd v Pembinaan MCP Sdn Bhd [2002] MLJU 597 (refd)

Legislation referred to

Arbitration Act 1950 ss 24, 27
Companies Act 1965 ss 218, 221, 236(2)

Companies (Winding-Up) Rules 1972 rr 24, 193
Courts of Judicature Act 1964 s 42

Appeal from: Companies Winding Up No D3–28–1000 of 2003 (High Court, Kuala Lumpur)

A Kanesalingam (K Shanmuga with him) (Kanesalingam & Co) for the appellant.
SJ Ooi (Wong-Chooi & Mohd Nor) for the respondent.

Nik Hisham JCA (now FCJ, delivering judgment of the court):

[1] This judgment is delivered pursuant to s 42 of the Courts of Judicature Act 1964 (Act 91) as Denis Ong JCA, who presided at the hearing of the appeal, has since retired.

[2] The undisputed facts are that the petition for winding-up was presented against the appellant after the service of a statutory notice under s 218 of the Companies Act 1965 ('the Act') on the appellant requiring payment of RM1,117,179.68 based on a judgnent obtained by the respondent dated 11 June 2003 which had been converted from an arbitral award pursuant to s 27 of the Arbitration Act 1950.

[3] The appellant had, after service of the statutory notice but before the filing of the petition, filed a cross claim against the respondent in High Court Pulau Pinang Civil Suit No 22–597–2003 (MT4) for RM2,107,171.67 special damages and general damages.

[4] An application to set aside that arbitral award for misconduct under s 24 of the Arbitration Act 1950 was then the subject of civil appeal P–02–905–2002 in the Court of Appeal. On 22 June 2004 the Court of Appeal dismissed the appeal.

[5] Both the High Court and the Court of Appeal had before the filing of the cross claim dismissed the appellant's applications for a stay of execution proceedings on the judgment pending the hearing and disposal of the appeal against the judgment The appellant's cross claim against the respondent in the High Court Pulau Pinang has not been disposed of.

[6] On 27 December 2003 the appellant filed the notice of motion (encl 6) ie, after the winding-up petition was filed and served on the appellant on 8 December 2003. The motion prayed for an order mat the respondent be

restrained by injunction from taking any further proceeding upon the petition by advertising the same and that the petition be removed from the file of proceedings.

[7] On 24 March 2004 the learned judge of the High Court Kuala Lumpur dismissed the motion with costs on the following grounds:

(1) Permohonan responden (appellant) adalah suatu penyalahgunaan proses undang-undang kerana responden (appellant) tidak boleh menghalang pempetisyen dari mengiklankan dan inewartakan petisyen penggulungan yang difailkan. Ini adalah kerana di bawah k 24 Kaedah-Kaedah Penggulungan Syarikat 1972, sesuatu petisyen penggulungan itu mesti diiklankan dan diwartakan. Ini adalah suatu peruntukan mandatory.

(2) Selain dari itu, permohonan responden (appellant) untuk menangguhkan perlaksanaan penghakiman yang diperoleh oleh pempetisyen (respondent) terhadap responden (appellant) juga telah ditolak oleh Mahkamah Rayuan pada 19 Ogos 2003. Ini menunjukkan Mahkamah Rayuan berpendapat tiada sebarang keadaan khas yang wujud untuk menjadi alasan kenapa penghakiman tersebut tidak boleh dikuatkuasakan.

(3) Petisyen penggulungan ini adalah berdasarkan satu penghakiman Mahkamah yang sempuma dan boleh dikuatkuasakan.

(4) Walaupun responden (appellant) dikatakan mempunyai satu tuntutan balas terhadap pempetisyen (respondent) yang mana dinafikan oleh pempetisyen (respondent) ianya masih boleh diteruskan walaupun syarikat responden (appellant) digulungkan. Ini adalah kerana tuntutan balas tersebut adalah tersendiri dan berasingan daripada tindakan ini.

(5) Notis di bawah s 218 Akta Syarikat 1965 telah diserahkan kepada responden (appellant) di alamat berdaftarnya pada 15 September 2003 dan alamat perniagaarmya pada 23 September 2003. Walaubagaimanapun responden (appellant) tidak berbuat apa-apa sehinggalah petisyen penggulungan difailkan pada 4 November 2003 dan tarikh perdengaran petisyen ini telah ditetapkan pada 11 February 2004.

(6) Tiada keadaan khas yang ditunjukkan oleh responden (appellant) bagi membenarkan permohonan responden (appellant) ini.

Before us, learned counsel for the appellant contended that:

(a) the respondent had no standing to file the winding up petition against the appellant because the appellant has a valid cross claim which exceeds

the amount in the judgment obtained by the respondent and in support he cited two cases:

(i) *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 where Lord Edmund - Davies in delivering the judgment of the Judicial Committee of the Privy Council said at p 55 para A–B:

> There is no distinction in principle between a cross-claim of substance (such as in the Wools case) and a serious dispute regarding the indebtedness imputed against a company, which has long been held to constitute a proper ground upon which to reject a winding-up petition.

(ii) In *Re Bayoil SA* [1999] 1 WLR 147 where the English Court of Appeal held that where a winding-up petition was based on an undisputed debt but the company had a genuine and serious cross-claim, which it had been unable to litigate, exceeding the amount of the petitioner's debt the court would, in the absence of special circumstances, exercise its discretion by dismissing or staying the petition; and that, accordingly, in the circumstances, the judge should have either dismissed or stayed the petition.

and

(b) the High Court has powers under s 221 of the Act, r 193 of the Companies (Winding Up) Rules 1972 ('the Rules') and under its inherent jurisdiction to restrain the advertisement of the petition and to make consequential orders.

[8] With respect, we do not agree. The respondent's winding-up petition was grounded on a valid judgment the execution of which had not been stayed. In fact both the High Court and the Court of Appeal had before the filing of the cross claim dismissed the appellant's application for a stay of execution of the judgment. Hence the respondent should not be prevented from pursuing its right to have the appellant wound up for its inability to pay its debt. Only on the hearing of the petition the court would be able to consider the cross claim and determine whether it should exercise its discretion to order winding-up or not to order it In the event the appellant is ordered to be wound up the cross claim can still be proceeded by the liquidator on behalf of the appellant under s 236(2) of the Act (*Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Ltd* [1997] 2 MLJ 756). Thus, to consider the cross claim, which is a separate issue altogether, before the hearing of the petition is premature and therefore, it should not be considered at that stage (see *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447).

[9] The test in *Re Bayoil*, regarding cross claim is not applicable in the present case, *Re Bayoil* was decided upon consideration of a foreign statute. The case, like Malayan Plant, also fortifies the view that the power of the court to dismiss or stay me petition is to be exercised only 'on the hearing of the petition' and not earlier. Therefore, the need to show special circumstances why the appellant should be wound up before the cross claim is determined does not arise.

[10] We agree with the respondent that the cross claim at this stage of the proceedings remains illusory and uncertain since it had still to go through the process of litigation before it could eventually graduate into a judgment (see *RHB Bank Bhd v Pembinaan MCP Sdn Bhd* [2002] MLJU 597). Even if there exists the cross claim, the petition should not be struck out in limine and should be heard on its merit (*Morgan Guaranty Trust Co New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95).

[11] With regard to the appellant's contention that die High Court has powers under s 221 of the Act, r 193 of the Rules and under its inherent jurisdiction to restrain the advertisement of the petition, we hold that the contention has no merit s 221 clearly provides for powers of court 'on hearing a winding-up petition' and not before the hearing of the petition and whereas r 193 provides for enlargement or abridgment of time which clearly has no relevance to the issue before us. The request for invocation of inherent powers of the court is misplaced — r 24 of the Rules clearly governs this case and prescribes a requirement of advertisement of petition upon it being filed. By its terms, the requirement is mandatory; and surely the court cannot disregard the provision and act outside it.

[12] In our judgment, once a winding-up petition is filed, the court is precluded from granting an injunction against advertisement or gazettal of the petition. In this regard, we agree with Vincent Ng J (later JCA) in *Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn End* [2002] 4 MLJ 390 at p 396 where he said:

> I would hold that the court is not empowered to make any order to restrain or injunct the petitioners from carrying out their statutory obligation to comply with r 24.

[13] Therefore, the appellant is not entitled to the injunctive relief prayed for as the appellant's cross claim for damages was purely monetary in nature; mere was nothing to be preserved by the grant of the injunction and indeed, mere is no evidence of any irreparable harm. Thus, the learned judge was right in dismissing the motion with costs.

[14] Accordingly, we dismiss the appeal with costs and order that the deposit be paid to the respondent to account of its taxed costs. My learned brother Hashim Yusoff FCJ has seen this judgment in draft and has expressed his agreement with it.

Appeal dismissed with costs.

Reported by Brendan Navin Siva